

DEC 6 - 2002

FCC - MAILROOM

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing
the Telephone Consumer Protection Act of 1991

)
)
) CG Docket No. 02-278
)
)

**COMMENTS OF
THE BROADCAST TEAM, INC.
ON THE NOTICE OF PROPOSED RULEMAKING**

INTRODUCTION

The Broadcast Team, Inc. (TBT) is based in Ormond Beach, Florida and has been providing direct marketing services utilizing direct mailing and Interactive Voice Response (IVR) Telephone technology since 1992. Among its services TBT provides database management, voice broadcasting and IVR based marketing programs. TBT has developed significant technical expertise related to telephony technologies under review by the Commission. Additionally TBT has been in the unique position of managing the company specific Do-Not-Call databases for numerous companies that have implemented Voice Broadcasting campaigns across various industries. In this capacity TBT has been privy to extensive information as to the temperament of consumers regarding the use of both live telemarketing and the use of prerecorded message communications by Radio and Television stations.

COMMENTS

Regarding Radio or Television Station use of prerecorded messages

A prerecorded message that does not contain an offer to purchase goods or services, such as the invitation from a Radio Station to consumers to listen to their station, must not be defined as a "solicitation" by the FCC. Some have suggested that because a commercial entity broadcasting a prerecorded message may benefit indirectly from the delivered message, the call should be considered a solicitation. In the example of a Radio station this "indirect" benefit could come from an increase in the station's audience ratings resulting from increased awareness of their programming. Should the FCC concur with

this interpretation, TBT believes the repercussions would have a broad and significant negative impact on all businesses who send prerecorded messages that are commercial in nature but do not contain any unsolicited advertisements. These repercussions would have a significant negative impact on consumers and possibly upon the TCPA itself

Because the FCC incorporated an exemption into the TCPA for “commercial calls that do not contain an unsolicited advertisement” (the “non-solicitation” exemption) it is understood that the FCC acknowledges the important need for commercial entities to be allowed to use voice-broadcasting technology in this manner. Should the FCC conclude that Radio Station calls are “solicitations” simply because a station may benefit from the call, the practical effect on the rest of the business community would be the elimination of the non-solicitation exemption entirely, since commercial entities would have no safe harbor from private party lawsuits claiming that any potential benefit to the commercial entity created a solicitation, and therefore non-compliance. For example, virtually all charitable giving by corporations is perceived to have a positive impact on corporate image, resulting in an improved perception of the company by consumers and ultimately some financial benefit to the company. Therefore any unsolicited automated call by a business to consumers that conveys anything positive the company may be doing in the community, such as sponsoring a community fundraising drive, would be subject to the “interpretation” that that call was a solicitation.

The Government’s Interest in regulating Radio Station’s prerecorded messages

As a provider of direct marketing and database management services TBT manages the company specific do-not-contact databases for 56 Radio stations and 12 Television stations in major markets around the country. In this capacity TBT receives complete and comprehensive information regarding every consumer who has requested to be placed on our client’s do-not-call list(s) following the use of both live telemarketing and prerecorded message calling in the manner under review. The following statistics represent the total number of complaints a representative sampling of TBT clients received as a result of their use of pre-recorded messages in the manner under review by the commission:

Station State	Format	Number of messages delivered by station	Number of Do-Not-Call requests received	Percentage of DNC requests to number of delivered messages
MI	FM Urban	531,171	15	.00282%
CA	AM Talk	377,892	71	.01878%
UT	FM Country	300,413	17	.00565%
UT	FM Alternative	221,857	16	.00721%
Totals		1,431,333	119	.00831%

As the table above shows, the average percentage of complaints from consumers regarding prerecorded messages of the type under review is .00831% or approximately 8 households out of each 100,000 that received such prerecorded messages. Therefore 99.992% of households did not feel the calls they received from Radio Stations were objectionable to the point where they felt the need to request no further similar calls. Of those few households who requested to have their telephone number removed from the Station's future calling campaigns, on average 11% of these phone numbers are now listed in their respective state Do-Not-Call file. Therefore these consumer's numbers would have been eliminated from the station's original calling list had the consumer's State Do-not-call list been in effect at the time the prerecorded calls were made. In effect, a "ban" on this type of communication would only serve the interests of .008% of households.

These statistics hold up for other Radio station formats, as well as for Television station's similar use of the technology. Although consumers vigorously object to receiving unsolicited sales presentations using prerecorded messages, TBT's statistics show that consumers do not object to receiving prerecorded calls from Radio and TV stations. The main reason for consumer's lack of concern regarding these calls is that consumers do not consider these calls solicitations. In the NPRM the Commission agreed with this sentiment when it stated that "messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by section 227" (1992 NPRM, 7 FCC Rcd at 2737). Clearly the government has no substantial interest in regulating this type of speech.

The problem of exploitation by trial lawyers of TCPA ambiguities results in undue restrictions imposed upon the business community

The current vagueness within the TCPA with regards to a precise definition as to what is a "solicitation" has spawned a cottage industry of private parties and 3rd parties such as trial lawyers seeking to escalate individual claims of violations of the TCPA to class action status. These suits are widely perceived as a means of "shaking down" legitimate businesses that choose to use messaging technology in good faith and under a reasonable interpretation of the law. Many businesses such as Radio stations that delivered automated messages in the manner under review are currently the subject of class action lawsuits exceeding \$100 million for an individual station's single calling campaign. Because legitimate businesses do not want to risk the horrendous monetary exposure that a ruling against their interpretation of "solicitation" may result in, these suits have had the effect in the marketplace of virtually eliminating all calling campaigns whose compliance falls solely within the TCPA's "non-solicitation" exemption. These class action suits have effectively eliminated the non-solicitation exemption, specifically created by the FCC as a way to balance the needs of consumers and the business community. It was never the intent of the FCC to create the TCPA as a vehicle for trial lawyers to cripple or destroy businesses that use legitimate telemarketing practices that may be objectionable to a vast minority of consumers. This is an unacceptable exploitation of the TCPA, which is not in the public's interest. TBT believes the FCC has a duty to ensure that the

remedies by which compliance can be enforced are within the sole control of the FCC and not subject to exploitation by unaffected third parties with personal, selfish or greedy motivations.

TBT feels that a further refinement of the existing definition of “solicitation” will not solve this problem. Regardless as to how the FCC may define a compliant calling “script”, each unique calling message delivered under the non-solicitation exemption will continue to be open to interpretation as to its compliance. The best way to ensure that the non-solicitation exemption remains available to all businesses is to eliminate the incentive for unaffected 3rd parties to attack legitimate businesses based solely upon the plaintiffs “interpretation” of TCPA language. A statement from the FCC similar to the following would accomplish this: *“The TCPA carries with it specific and substantial remedies for individual consumers to pursue. The remedies provided within the TCPA are neither intended nor suitable to be pursued via class action.”* Without such a clarification by the FCC legitimate business applications for this technology will continue to be unreasonably restricted.

CONCLUSION

With regard to the exemptions provided in the TCPA for delivery of prerecorded messages, TBT feels that the TCPA in its present form strikes an excellent balance between the needs of both consumers and business. However the lack of specificity in defining the terms “commercial” and “advertising” as used in the TCPA has left open to interpretation whether Radio Station use of prerecorded messages such as that under review falls within the TCPA exemption guidelines. TBT believes that this matter is not a serious concern for consumers, as exemplified via TBT’s historical response data from consumers who have received such calls. It is however, an extremely important matter to the hundreds of TV and Radio stations who have used prerecorded messages in this fashion and are now under siege by trial lawyers hoping to “sue and settle” large class action lawsuits based solely upon the TCPA’s vagueness of language. It is for *this* reason the FCC has been asked to review the matter of prerecorded Radio Station calls. It is apparent that the real issue to be solved by the FCC by addressing these calls is the exploitation of the TCPA by unaffected third parties with personal, selfish or greedy motivations.

The solution to this matter is not for the FCC to become entangled in the minutia of defining specific verbiage that may or may not result in compliance. Consumers have a means to voice their opinions as to these matters within the TCPA as it currently exists. The best way to address the issues created by Radio station calls is to eliminate the incentive for unaffected 3rd parties to attack legitimate businesses based solely upon their “interpretation” of TCPA language. A statement from the FCC similar to the following would accomplish this: *“The TCPA carries with it specific and substantial remedies for individual consumers to pursue. The remedies provided within the TCPA are neither intended nor suitable to be pursued via class action.”* This clarification would effectively resolve the issue related to Radio station’s use of prerecorded messages. Without such a

clarification by the FCC legitimate business applications for using prerecorded messaging will continue to be unreasonably restricted.

The small number of legal challenges brought from the business community as to the constitutionality of the TCPA is a testament to the perception by business that the TCPA in its present form is inherently fair. However, should the FCC rule that Radio Station messages of the type under review are to be considered unsolicited advertisements, TBT believes the subsequent repercussions would unleash a torrent of lawsuits brought by tail lawyers against companies in ALL industries who rely upon the "non-solicitation" exception in the TCPA to maintain compliance. Any benefit that a company may have received from placing the calls, no matter how disconnected or separate from the company's main business, would have the effect of placing the company out of compliance with the TCPA. **As** a means of defending themselves against such attacks the business community can reasonably be expected to challenge the constitutionality of the TCPA as it relates to the government's interest in restricting these communications. One potential effect of intervention by the courts in these matters would be a limitation upon the scope of the TCPA or the elimination of the TCPA in its present **form**.

Respectfully submitted by

A handwritten signature in black ink, appearing to read "Mark Edwards", with a long horizontal line extending to the right.

Mark Edwards, President
The Broadcast Team, Inc
Tel 386-676-1157